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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| **JERRY GEBHART,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Civil Action No. 04-4025-JAR** |
| | ) | |
| **RAYTHEON AIRCRAFT COMPANY,** | ) | |
| | ) | |
| **Defendant.** | ) | |

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**MEMORANDUM ORDER AND OPINION DENYING MOTION TO REMAND; DENYING MOTION TO REMOVE DEFENDANT'S ATTORNEY; AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This action was filed in state court by plaintiff Jerry Gebhart and removed to federal court by defendant Raytheon Aircraft Company ("Raytheon"). Plaintiff alleges that in 2003 he was harassed, unlawfully terminated and denied access to certain benefits under defendant's employee benefit plan. Plaintiff further alleges that the termination, harassment and denial of benefits was in retaliation for: (1) his having testified against co-worker Bob McCall in 1988 in a trial concerning charges that McCall had stolen property from their employer; and (2) his having initiated discussions with defendant's management in 2003, concerning defendant's alleged dumping of hazardous waste in the Salina, Kansas area.

This comes before the Court on a number of motions, some of which are rendered moot by this Order, which denies remand, grants summary judgment and dismisses the case.[1] For the reasons

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[1]Because of this disposition, the following motions are rendered moot: defendant's Motion to Stay Discovery (Doc.19); plaintiff's Motion for Summary Judgment (Doc. 21); plaintiff's Motion to Appoint Counsel

discussed below, the Court: denies plaintiff's Motion for Removal of Defendant's Attorney for Conflict of Interest (Doc. 25); denies plaintiff's Motion to Remand (Doc. 9); and grants defendant's Motion for Summary Judgment (Doc.10).

**Motion for Removal of Defendant's Attorney**

Before addressing the dispositive motions, the Court must consider plaintiff's motion to remove defendant's attorney for an alleged conflict of interest. Plaintiff asserts that he had worked with Terry Mann, defendant's counsel of record, and others in the Martin Pringle law firm, when Plaintiff was a witness on behalf of the defendant in a theft case. But from plaintiff's cryptic description of his relationship with defendant's counsel, and from the uncontroverted additional material facts asserted by the defendant, the Court concludes that there is no conflict of interest in counsel's representation of defendant in this case.

The Martin Pringle law firm in Wichita has been general counsel for the defendant since the 1970s.[2] As plaintiff vaguely alludes to, in 1987, the Martin Pringle firm filed an action on behalf of the defendant, Raytheon, to recover stolen property or to obtain payment from the insurance company that provided coverage for employee theft. After November 1987, the Martin Pringle firm was no longer involved in the litigation, for the insurance company settled with Raytheon, taking an assignment of Raytheon's subrogation rights against the other defendants.[3] Some of the employee defendants in the

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(Doc. 23); plaintiff's motion to depose (Doc.28); and defendant's Motion for Order Cautioning Plaintiff Regarding his Rule 11 Responsibilities (Doc. 31).

[2]Prior to 1994, Raytheon Aircraft Company was known as Beech Aircraft Corporation.

[3]The named defendants were Thomas Ashley, Terry Shubert, Robert McCall, all of whom were employed by defendant at the time, Donald Cunningham and his company, and Federal Insurance Company. Ashley, Shubert, and McCall were suspended and then terminated from their employment with defendant.

1987 litigation pursued union grievances concerning their terminations springing from the thefts. Martin Churchill, a law firm unrelated to Martin Pringle, represented the union. Martin Pringle was not involved in representing Raytheon in the union grievance and arbitration hearings.

Moreover, plaintiff Jerry Gebhart was not a party to the 1987 litigation; nor was he a party to subsequent grievance and arbitration proceedings. Although plaintiff claims that he was a witness in the litigation, counsel states that a careful review of their files does not indicate that the Martin Pringle firm or Terry Mann deposed, interviewed or had contact with plaintiff prior to or during the pendency of the litigation. And, if plaintiff was a witness in the arbitration hearing, Martin Pringle and/or Terry Mann would not have had any contact with plaintiff in that regard. Martin Pringle's only involvement in the arbitration hearing was that it shared documents and information from the 1987 litigation with the Martin Churchill lawyers; Terry Mann testified during the arbitration about information she had discovered during the 1987 litigation. Terry Mann would not have had the opportunity to interact with the plaintiff as a fellow witness, for witnesses were sequestered during the arbitration hearing. No other lawyers or employees of Martin Pringle were witnesses in the arbitration proceeding. No lawyer from Martin, Pringle ever undertook an attorney-client relationship with Jerry Gebhart.

These facts demonstrate none of the bases for a disqualifying conflict of interest. Because defendant's counsel has never represented Gebhart, Rule 1.9 of the Model Rules of Professional Conduct[4] is not implicated.[5] As Judge Vratil noted in *Hall v. Martin*,[6] the "threshold question" when

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[4]D.Kan. Rule 83.6.1 incorporates the Kansas Rules of Professional Conduct as adopted by the Supreme Court of Kansas, except as otherwise provided by a specific local rule of this court.

[5]Rule 1.9 states: A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are

an issue under MRPC 1.9 arises is whether there was an attorney-client relationship between the attorney and the person alleging a conflict of interest.[7] To cross this threshold, the moving party must show that: "(1) [he] submitted confidential information to a lawyer and (2) [he] did so with the reasonable belief that the lawyer was acting as the party's attorney.[8] As the moving party, plaintiff has the burden of proving these elements.[9] Plaintiff does not allege nor prove these two elements.

**Motion to Remand**

Plaintiff filed this action in the District Court of Saline County, Kansas claiming that defendant Raytheon Aircraft Company violated numerous federal and state laws in wrongfully terminating him from employment. Plaintiff contends that his petition raises state law claims, in alleging that the termination violated a collective bargaining agreement between the defendant and union.[10] Defendant filed a timely notice of removal; and plaintiff filed a timely motion for remand.

The burden of showing the propriety of remand always rests with the removing party. *Christian*

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materially adverse to the interests of the former client unless the former client consents after consultation; or (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

[6]1999 U.S. Dist. LEXIS 14790, *13 (D. Kan. 1999).

[7] *Cole v. Ruidoso Mun. Sch*., 43 F.3d 1373, 1384 (10th Cir. 1994); *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1444 (E.D. Wis. 1993)(citing *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955, 58 L.Ed. 2d 346, 99 S. Ct. 353 (1978); *Hall v. Martin*, 1999 U.S. Dist. LEXIS at *14 (D. Kan. 1999)(citing *Nelson v. Green Builders, Inc.*, 823 F. Supp. at 1445 (E.D. Wis. 1993); *Flint Hills Scientific, L.L.C. v. Davidchack*, 2002 U.S. Dist. LEXIS 8472, 19 (D. Kan. 2002); *Harrod v. City of Salina*, 1997 U.S. Dist. LEXIS 15625, *5-6 (D. Kan. 1997).

[8]*Hall v. Martin*, 1999 U.S. Dist. LEXIS at *14 (D. Kan. 1999)(citing *Nelson v. Green Builders, Inc.*, 823 F. Supp. at 1445).

[9]*Flint Hills Scientific, L.L.C. v. Davidchack*, 2002 U.S. Dist. LEXIS at *19 (D. Kan. 2002); *Harrod v. City of Salina*, 1997 U.S. Dist. LEXIS at *5-6 (D. Kan. 1997).

[10]International Association of Machinists and Aerospace Workers.

*v. College Boulevard Nat. Bank*.[11] Plaintiff moves for remand on two grounds: (1) the notice of removal failed to name all defendants and thus failed to properly and timely remove the action; and (2) his action raises state law claims concerning violation of the collective bargaining agreement, which is governed by Kansas's "own pervasive regulatory scheme." Neither ground has merit.

Plaintiff challenges the notice of removal for not listing Raytheon Aircraft Holding, Inc. and Raytheon Company. To be sure, 28 U.S.C. §1446 requires that all *served* defendants, except nominal defendants, join in or consent to the removal notice within thirty days of service.[12] But there is only one defendant named in the caption (and body) of plaintiff's complaint, "Raytheon Aircraft Company, A Kansas Corporation." Plaintiff's Complaint simply did not name "Raytheon Company" or "Raytheon Aircraft Holding Inc." as defendants; thus the Notice of Removal properly lists the sole party defendant. Plaintiff, a *pro se* litigant, apparently is confused by Defendant's Corporate Disclosure Statement filed in this case,[13] which apprizes the Court that Raytheon Aircraft Company is wholly owned by Raytheon Aircraft Holdings, and that Raytheon Aircraft Holdings, Inc. is wholly owned by Raytheon Company. This Corporate Disclosure Statement does not operate as a substitution of parties or amendment of plaintiff's Complaint.

Plaintiff also appears to challenge jurisdiction, although not in clear or direct terms. The Court is mindful that it is to liberally construe the pleadings of a *pro se* plaintiff and hold his pleadings to a less

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[11] 795 F. Supp. 370, 371 (D. Kan. 1992).

[12] 28 U.S.C. §1446; *First Nat. Bank & Trust Co. in Great Bend v. Nicholas*, 768 F. Supp. 788, 790 (D. Kan. 1991); *Cohen v. Hoard,* 696 F. Supp. 564, 565 (D. Kan. 1988).

[13] *See* Fed. R. Civ. P. 7.1. The Corporate Disclosure Statement is required of corporate entities, so that the assigned judge can ascertain whether he or she has a financial interest in the party or associated entities, which would require recusal.

stringent standard than pleadings drafted by lawyers.[14] Plaintiff appears to allege that the Court lacks subject matter jurisdiction because there is no diversity of parties and there is no federal question jurisdiction for the claims are based on state law and a pervasive regulatory scheme under Kansas law. If there is no subject matter jurisdiction, this matter must be remanded, for a civil action is removable only if plaintiff could have originally brought the action in federal court.[15] The Court is required to remand "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction."[16] Because federal courts are courts of limited jurisdiction, the law imposes a presumption against federal jurisdiction,[17] and requires a court to deny its jurisdiction in all cases where such jurisdiction does not affirmatively appear in the record.[18]

There is no diversity of citizenship and thus no diversity jurisdiction in this case. However, there is federal question jurisdiction; in fact, federal law preempts state law on the claims raised in plaintiff's complaint. Plaintiff contends that his termination violated both federal and state laws; he claims that his termination violated the collective bargaining agreement (CBA).

An action such as this, alleging a violation of the CBA is subject to the Labor Management Relations Act.[19] Generally speaking, if an employee or former employee alleges a breach of a CBA,

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[14] *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[15] 28 U.S.C. § 1441(a).

[16] 28 U.S.C. § 1447(c).

[17] *Frederick & Warinner v. Lundgren,* 962 F. Supp. 1580, 1582 (D. Kan. 1997) (citing *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)).

[18] *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 72 L.Ed. 2d 492, 102 S. Ct. 2099 (1982).

[19] 29 U.S.C. § 185, *et seq.*

his exclusive remedy is the grievance procedure provided by the contract.[20] In addition, the Labor Management Relations Act[21] provides that any allegations of unfair labor practices must be brought before the National Labor Relations Board ("NLRB"), the forum established by Congress to hear such claims. As a result of the fact that Congress created a specific forum for claims relating to collective bargaining agreements, there are very limited exceptions to the general rule that a dissatisfied employee's only recourse is the grievance procedure or the NLRB. One exception is found in 29 U.S.C. § 185, which allows for a "hybrid" claim to be brought in court,[22] pursuant to § 301 of the Labor Management Relations Act, which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[23]

Congress has granted the federal courts removal jurisdiction to hear claims initially brought in state court if the federal district court could have exercised original jurisdiction.[24] The federal district courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of

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[20] *Sims v. Boeing Co.*, 215 F.3d 1337 (10th Cir. 2000).

[21] 29 U.S.C. § 141.

[22] *Garner v. Teamsters Union No. 766*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 165-66, 98 L. Ed. 228, 239 (1953).

[23] 29 U.S.C. § 185(a).

[24] 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

the United States.[25] Plaintiff's case arises under § 301of the Labor Management Relations Act,[26] a federal statute, giving the Court subject matter jurisdiction.

Moreover, although plaintiff alleges violations of state law and federal law, the complaint states only federal claims. The Labor Management Relations Act preempts a variety of claims alleging violation of a collective bargaining agreement. As the Tenth Circuit Court of Appeals noted in *Garley v. Sandia Corp.*,[27] § 301 "expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" Section 301 establishes a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts."[28]

Consequently, in *Teamsters v. Lucas Flour Co.*,[29] the Court held that § 301 may preempt state law, ruling that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." As the Court subsequently explained in *Allis-Chalmers*,[30] *Lucas Flour* "held that a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is preempted by federal labor law. This

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[25]28 U.S.C. § 1331.

[26]29 U.S.C. § 185 *et seq*.

[27]236 F.3d 1200, 1207-08 (10th Cir. 2001)(quoting *Allis- Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 85 L.Ed. 2d 206, 105 S. Ct. 1904 (1985)(quoting *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957)).

[28]*Allis-Chalmers*, 471 U.S. at 209.

[29]369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962).

[30]471 U.S. at 210.

holding is contrary to plaintiff's argument that there are "issues of substantial local importance that would transcend federal court jurisdiction in the case, even if such jurisdiction existed."

Plaintiff may contend that his claim is really one based on some unidentified state law cause of action. But, as the court held in *Greenhagen v. Union Pacific Sys*,[31] when principles of federal labor law are involved, they supersede state contract law or other state law theories. Federal law preempts state law, and plaintiff's claims, all based on violations of the CBA, are necessarily federal question claims. As the Tenth Circuit held in *Albertson's, Inc. v. Carrigan,*[32] § 301 preempts state law causes of action addressing "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, . . . whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort."[33] Thus, "when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor contract law."[34]

Under the well-settled law of this Circuit, the LMRA governs plaintiff's claims that the CBA

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[31] 1986 U.S. Dist. LEXIS 23205, * 7-8 (D. Kan. 1986).

[32] 982 F.2d 1478, 1480 (10th Cir. 1993).

[33] *Id.* (quoting *Saunders v. Amoco Pipeline Co.*, 927 F.2d 1154, 1155 (10th Cir.), *cert. denied*, 502 U.S. 894 (1991)). *See also Mock v. T.G.& Y. Stores Co.*, 971 F.2d 522, 529 (10th Cir. 1992), in which plaintiffs, who had been discharged, alleged a variety of state law claims. The district court held that the claims were preempted by § 301 of the LMRA. The Tenth Circuit affirmed, stating: Under the LMRA "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement" the state law claim is preempted. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 208-10; *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1018-20 (10th Cir. 1990); *Marshall v. TRW, Inc., Reda Pump Div.*, 900 F.2d 1517, 1520-22 (10th Cir. 1990);*United Ass'n. of Journeymen and Apprentices, Local No. 57 v. Bechtel Power Corp.,* 834 F.2d 884, 887-89 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

[34] *Allis Chalmers Corp. v. Lueck*, 471 U.S. at 220.

was breached by defendant. Any state law cause of action asserted by plaintiff would be preempted, as the meaning of the CBA would be central to the claim. There being no state law claims independent of the federal question claims in this case, the Court denies the motion to remand. As there are no state law claims, so the Court does not reach the question of whether to remand state law claims or to exercise supplemental jurisdiction.

**Motion for Summary Judgment**

Defendant moves for summary judgment on the basis that plaintiff's claims are barred by the statute of limitations; by plaintiff's failure to exhaust his grievance procedure; and plaintiff's failure to state a claim by failing to allege that the union failed to fairly represent him. Because the hybrid § 301 claim is barred by both failure to exhaust and the statute of limitations, the Court grants summary judgment on that claim. Even if the claim had been exhausted and timely filed, plaintiff fails to state a claim by failing to allege that the union failed to fairly represent him.

*Standards for Summary Judgment*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[35] The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[36] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of

[35]Fed. R. Civ. P. 56(c).

[36]*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

law."[37]

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case.[38] Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[39] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."[40] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[41] The court must consider the record in the light most favorable to the nonmoving party.[42]

The court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[43]

*Uncontroverted Facts*

Because defendant asserted a number of factual contentions, properly supported by reference

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[37] *Id*. at 251-52.

[38] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[39] *See Anderson*, 477 U.S. at 256.

[40] *Id*.

[41] *See id.*

[42] *See Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied* 469 U.S. 1214 (1985).

[43] *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

to the record, that were not controverted or improperly controverted by plaintiff, the Court adopts the following material uncontroverted facts.

Defendant Raytheon Aircraft Company[44] is a manufacturer of aircraft for general aviation and military. The International Association of Machinists and Aerospace Workers (the union) is the union that represents the hourly-compensated employees at defendant's Wichita and Salina manufacturing facilities. Defendant and the union have been parties to collective bargaining agreements since 1939. The current CBA, which applies to this dispute, was effective on August 6, 2001, and will expire on July 31, 2005. At the time of his layoff, plaintiff was classified as an Auto Mechanic, Job Code 172, an hourly position covered by the CBA. Earlier, plaintiff had held other positions with defendant; these were also hourly positions. The CBA includes very specific provisions regarding reductions in force or layoffs of covered employees.

An employee having a grievance against the company with respect to the interpretation or application of the CBA must present the grievance to the employee's immediate supervisor within three workdays, either personally or through the steward of the department on the shift to which the employee is assigned. A grievance must be in writing and state in detail the facts complained of and the provisions of the agreement which are alleged to have been violated. If grievances are not filed or processed in the manner and within the times set forth in the agreement, they are forever barred.

In 2003 and 2004, defendant significantly reduced the number of employees working at the Salina plant. In January of 2003, there were 322 "direct" employees, and 96 "indirect." By March of

[44]Prior to 1994, when its name was changed to Raytheon Aircraft Company, defendant was known as Beech Aircraft Corporation. Although plaintiff's employment commenced when the company was Beech Aircraft Corporation, in the interest of clarity, defendant will use Raytheon Aircraft Company or RAC throughout.

2004, there were 198 "direct" and 67 "indirect." On April 9, 2003, plaintiff was notified that as the result of a reduction in force in Department 765, he would be laid off at the close of shift on April 11, 2003.

The parties dispute whether plaintiff availed himself of the grievance and arbitration process that is provided by the CBA. Defendant contends that plaintiff never filed a grievance with defendant or the union. Defendant states, and attaches supporting documentation, that plaintiff did not contact the union until more than 40 days after the layoff, and then to inquire about his accrued vacation pay, not to initiate a grievance of the layoff. Plaintiff never initiated a grievance concerning vacation pay either.

In plaintiff's declaration attached to his cross motion for summary judgment,[45] plaintiff states, "[p]laintiff availed himself of the grievance and arbitration process that is provided by the CBA, on or around May 2003, but the union failed to respond." Plaintiff did not support this conclusory statement with any documentation, nor any evidence demonstrating that he had filed a grievance with the union or with defendant. Nevertheless, for purposes of this motion, the Court treats plaintiff's assertion as true.

*Statute of Limitations*

Plaintiff alleges that defendant's termination of him was arbitrary, capricious, discriminatory and retaliatory, in violation of the CBA. Plaintiff does not dispute defendant's characterization of this action as a "hybrid" action brought pursuant to §301 of the LMRA. Nor is there any dispute that plaintiff was terminated on April 11, 2003, and filed this action on March 10, 2004. Thus, there is no dispute that plaintiff filed this action more than six months after he was terminated.

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[45]The Court treats plaintiff's Motion for Summary Judgment (Doc. 21) as a response to defendant's motion for summary judgment.

In *DelCostello v. International Broth. of Teamsters*,[46] the Supreme Court held that a six month limitation period applies to hybrid actions under § 301. The cause of action accrues, and the six month limitations period begins to run when a plaintiff discovers, or should have discovered, with the exercise of reasonable diligence, the acts constituting the alleged violations.[47]

Because "hybrid" claims are subject to a six-month statute of limitations, plaintiff filed this action well after the statute of limitations had run on October 12, 2003. Plaintiff makes no argument that the limitations period should be tolled, or extended, or that it should not apply in this case for some other reason. Plaintiff's claim is barred by the applicable statute of limitations.

*Failure to Exhaust Grievance Procedure*

As Judge Marten noted in *Sims v. Boeing Co.,*[48] if a CBA sets forth a grievance procedure, that procedure is the exclusive and final remedy for disputes arising under that agreement. [49] If an employee "resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedy provided by such a contract have not been exhausted."[50]

In enacting 29 U.S.C. §173(d) and 29 U.S.C. §171(c), Congress has expressed approval of

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[46] 462 U.S. 151, 165, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

[47] *Id; Sims v. Boeing Co.*, 60 F. Supp. at 1229.

[48] 60 F. Supp. at 1228.

[49] *Vaca v. Sipes*, 386 U.S. 171, 184, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[50] *Id.; see also United Food and Commercial Workers Local Union No. 7R v. Safeway*, 889 F.2d 940, 944 (10th Cir. 1989)("[A]n employee can only sue if he or she has exhausted any exclusive grievance procedures provided in the collective bargaining agreement.").

contract grievance procedures as the preferred method for "settling disputes and stabilizing the common law of the plant."[51] For allowing an employee to bring suit under § 301 without attempting to exhaust the grievance procedures would "deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."[52] It cannot be said that "contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."[53]

Article 8 of the CBA at issue in this case states the grievance procedure, and informs employees that they have just three workdays to assert any grievance. The employee can assert a grievance through a union steward; alternatively the employee can assert a grievance on their own behalf, rather than through the union. Defendant contends that plaintiff never filed any grievance with the union or the company about his layoff. Although Plaintiff asserts[54] that he unsuccessfully attempted to contact the union in May of 2003, he does not support this assertion and thus does not genuinely controvert defendant's factual contention, which is supported by reference to the record. But even accepting plaintiff's unsupported assertion as true, an attempt to initiate a grievance in May, would not be within the three day deadline established in the CBA to initiate a grievance. At the least, plaintiff failed to file a timely grievance; and he cannot be allowed to use this forum to pursue the grievance that should have been pursued in accordance with the CBA.

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[51] *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Clayton v. International Union, United Auto., Aerospace, and Agr. Implement Workers of America*, 451 U.S. 679, 686 (1981).

[52] *Id.*

[53] *Id. at* 687.

[54] *See* Plaintiff's Cross Motion for Summary Judgment (Doc. 21 ).

As the Supreme Court noted in *Republic Steel Corp. v. Maddox,*[55] a contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."[56]

Plaintiff did not timely avail himself of the grievance and arbitration process that is provided by the CBA. Even if plaintiff had attempted to contact the union in May of 2003, and even if that contact was the timely initiation of a grievance, plaintiff failed to file this action within six months after May of 2003. The statute of limitations would still bar this action. Thus, his failure to exhaust the grievance procedure is a second basis to grant summary judgment to defendant.

*Failure to State a Claim*

As the Tenth Circuit noted in *Edwards v. International Union, United Plant Guard Workers of America*,[57] a "hybrid" action under § 301 of the Labor Management Relations Act ,[58] is a:

> judicially created exception to the general rule that an employee is bound by the result of grievance or arbitration remedial procedures provided in the collective bargaining

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[55]379 U.S. at 653.

[56]*Id.* at 654 (quoting *Teamsters Local v. Lucas Flour Co.*, 369 U.S. at 103).

[57]46 F.3d 1047, 1051 (10th Cir.), *cert. denied* 516 U.S. 811 (1995)(quoting *Vaca v. Sipes*, 386 U.S. at 185-86; *Aguinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1463, 1471-72 (10th Cir.1993)).

[58]29 U.S.C. § 185.

> agreement. . . . Where an employee can prove he suffered a . . . violation of the collective bargaining agreement that would have been remedied through the grievance process had the union fulfilled its statutory duty to represent the employee fairly, federal law will provide a remedy. . . . "In such instance, the union has effectively ceased to function as the employee's representative.". . . To leave the employee remediless under these circumstances would, in the words of the Supreme Court, "be a great injustice."

Thus, federal law permits an employee to pursue a § 301 action against his employer notwithstanding the outcome or finality of the grievance or arbitration process, provided the employee simultaneously proves he would have obtained a remedy under the agreement but for the union's misconduct.[59]

In a "hybrid" action, an employee typically makes claims against both his employer and his union based on an alleged violation of the CBA by the employer and an alleged breach of the duty of fair representation by the union.[60] Although plaintiff sued only the employer and not the union, this is still a "hybrid" action. As this Court noted in *Balderas v. Cessna Aircraft Co.,*[61] an employee in a "hybrid" suit "may sue either the union, his employer or both. However, 'a plaintiff may not prevail against *either* his employer or his union unless he establishes that his discharge contravened the collective bargaining agreement *and* that his union breached its duty of fair representation.'"[62] Unless an employee can show that his union failed to fairly represent him in his claim against his employer, the employee cannot pursue a direct action against the employer for breach of the collective bargaining

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[59] *Vaca v. Sipes,* 386 U.S. at 186 & n. 11.

[60] *See Mock v. T.G.&Y. Stores Co.*, 971 F.2d at 530; *Hartwick v. Dist. Lodge 70, Intern. Ass'n of Machinists and Aerospace Workers,* 184 F. Supp. 2d 1092, 1098 (D. Kan. 2001).

[61] 2003 U.S. Dist. LEXIS 4138, *12 (D. Kan. 2003).

[62] *Id.* (quoting *DelCostello v. Int'l Broth. of Teamsters,* 462 U.S. at 164-65 (1983). *Accord Young v. United Auto. Workers-Labor Employment and Training Corp.,* 95 F.3d 992, 996 (10th Cir. 1996).

agreement.[63]

In this action, plaintiff has not even alleged that the Union breached its duty of fair representation. At best, plaintiff alleges that he unsuccessfully attempted to contact the union, implying that the union failed to respond to him, or assist him in the grievance procedure. But, plaintiff must show that the union's actions were irrational, invidiously discriminatory against him, or were conducted in a fraudulent, deceitful or dishonest manner.[64] The Tenth Circuit has described the limited situations in which a union's conduct is considered "arbitrary, discriminatory, or in bad faith" as those where the union's conduct is "invidious" or "so far outside a wide range of reasonableness as to be irrational."[65] A union does not breach its duty of fair representation by refusing to take an employee's grievance to arbitration.[66] Likewise, proof that an employee had a meritorious grievance is alone insufficient to prove that the union failed to fairly represent him.[67] In short, plaintiff has failed to state a claim for relief.

**IT IS THEREFORE ORDERED BY THE COURT** that plaintiff's Motion for Removal of Defendant's Attorney for Conflict of Interest (Doc. 25) is DENIED**.**

**IT IS FURTHER ORDERED** that plaintiff's Motion to Remand (Doc. 9) is DENIED.

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[63] *Vaca v. Sipes*, 386 U.S. at 186-87; *Mock v. T.G. & Y. Stores Co.,* 971 F.2d at 531(holding that proof of union's breach of duty to fairly represent is an "essential element" of an employee's hybrid suit). *See Edwards v. Int'l Union, United Plant Guard Workers of America*, 46 F.3d at 1047 (Under the exception to the finality rule set forth in *Vaca*, an employee's unfair representation claim against his union and the underlying § 301 claim against his employer are "inextricably interdependent").

[64] *Valdivia v. Ohse Foods, Inc.,* 820 F. Supp. 574, 582 (D. Kan. 1993)(citing *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 372-73 (1990).]

[65] *Aguinaga v. United Food & Com. Workers Int'l*, 993 F.2d at 1470.

[66] *Vaca v. Sipes*, 386 U.S. at 191; *Chernak v. Southwest Airlines Co.*, 778 F.2d 578, 581 (10th Cir. 1985); *McLinn v. Boeing Co.*, 715 F. Supp. 1024, 1031 (D. Kan. 1989).

[67] *Vaca v. Sipes,* 386 U.S. at 192-95*; McLinn,* 715 F. Supp. at 1031-33.

**IT IS FURTHER ORDERED** that defendant's Motion for Summary Judgment (Doc.10) is GRANTED and that this case is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

Dated this 25th day of May 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge